Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KATHERINE HODGES,

Petitioner,

v.

CITY OF HOUSTON, GREG HUNTSMAN, *et al.*,

Respondents.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

At the district court level, Respondent Greg Huntsman ("Huntsman") and three co-defendants filed Defendants' Motion for Summary Judgment or in the Alternative, Motion for Dismissal. The district court denied the motion without indicating if it were ruling under Rule 12(b)(6) or Rule 56, Fed. R. Civ. P. Unlike the two other individual co-defendants, Huntsman's motion alleging qualified immunity was based solely on his attorney's argument contained within the motion. The record is barren of any evidence elsewhere. The district court denied the motion and the Fifth Circuit reversed solely on the grounds that Petitioner rested on her pleadings. Petitioner contends that the Fifth Circuit reviewed the appeal under Rule 56(c) when it should have reviewed the appeal under Rule 12(b)(6).

Petitioner Katherine Hodges asks this Court to decide whether the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the caption of the case in this Court, other parties not a part of this petition for writ certiorari are E. J. Stringfellow, R. D. Lynn, Jr., and City of Houston, Texas.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KATHERINE HODGES,

Petitioner,

vs.

CITY OF HOUSTON, GREG HUNTSMAN, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Katherine Hodges ("Hodges") respectfully prays that the Supreme Court grant a writ certiorari to review the order of the Fifth Circuit filed on August 31, 1994, and the denial for rehearing filed September 28, 1994.

OPINIONS BELOW

The opinions of the courts below have not been published. The Court of Appeals orders are reprinted in Appendices A and B. The order of the district court is reprinted in Appendix C.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit was filed on August 30, 1994. Petitioner filed a timely motion for rehearing. The order denying rehearing was filed September 28, 1994. The jurisdiction of this Court is timely invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of the statutory provisions involved in this case, namely, Rules 12(b)(6) and 56(c), Fed. R. Civ. P., codified under Title 28, are reprinted in Appendix D.

STATEMENT OF THE CASE

A. The Facts

The instant case is an employment discrimination case. Petitioner Katherine Hodges ("Hodges"), employed by the City of Houston as a uniformed marshal in the police department, sued Respondent Greg Huntsman

("Huntsman"), individually, as well as R. D. Lynn, Jr. ("Lynn"), individually, E. J. Stringfellow ("Stringfellow"), individually, and the City of Houston, Texas ("the City"). Hodges, black, female, contends that she suffered race and gender discrimination in the terms and conditions of employment. The case was brought under 42 U.S.C. §§ 1981, 1983, 1988 and 2000e *et seq.* ("Title VII"). Certain other state claims were brought under pendent jurisdiction.

Lynn, Stringfellow and Huntsman [as part of a longer motion filed by the City] claimed qualified immunity and moved for summary judgment or, in the alternative, dismissal under Rule 12(b)(6). Appendix E. On December 9, 1993, without indicating whether it reviewed the motion under Rule 12(b)(6) or Rule 56(c), Fed. R. Civ. P., the trial court entered an order denying the motion and in a one sentence opinion held that: "The defendants' motion for summary judgment or in the alternative, motion for dismissal is Denied." Appendix C. On June 6, 1994, Lynn, Stringfellow and Huntsman appealed. R. 81. By order filed August 30, 1994, the Court of Appeals for the Fifth Circuit reversed the trial court. On September 28, 1994, Hodges' motion for rehearing was denied. Hodges moves this Court for Writ of Certiorari as to Huntsman only.

Hodges contends that after she received a doctor's note restricting certain job duties, she was taken out of uniform and made to wear civilian clothes from June 12, 1990, to September 9, 1990. R. 9-10, 40. White male

employees similarly situated, such as E. R. Campbell, disabled on one side, and J. D. Patrick, only one eye, were allowed to work in uniform. R. 9-10, 40.

The only evidence beyond the pleadings offered by any defendants was three exhibits consisting of the doctor's note of June 6, 1990 (Exhibit 1), memo of June 12, 1990, from Lynn to Hodges re restriction of duties (Exhibit 2), and memo of doctor dated June 21, 1990, allowing Hodges to report to the gun range (Exhibit 3). Appendix E, pp. 32a-35a.

From June 12, 1990, to September 9, 1990, Hodges did not work with nor under the supervision of Huntsman. *Id.* In the Fall of 1990, Hodges was placed under the supervision of Greg Huntsman, male. R. 9. Up to the Fall of 1990, Huntsman had no contact with Hodges. The record reflects that Hodges' allegations against Huntsman began at the time she went to work under Huntsman's supervision. R. 8-9.

The consolidated motion of Lynn, Stringfellow, Huntsman and the City limited its discussion to the period June 6, 1990 - September 9, 1990. The entire substantive factual allegations of the summary judgment motion as filed by Lynn, Stringfellow and Huntsman reads as follows.

"In 1990, Plaintiff suffered a physical ailment and was placed on restrictive duty by her physician, Dr. Ronald Devere. Specifically, Plaintiff's physician

recommended that Plaintiff perform only 'inside office duties,' as outdoor performance would exacerbate her medical condition. (*See* Defendant's Exhibit #1 and #3). To accommodate her physician's request, Defendants Chief Stringfellow and Lynn removed all law enforcement duties from Plaintiff, including operating a City Marshal's vehicle and wearing an identifiable uniform, to avoid possible endangerment to her, particularly, if she were required to respond to an immediate call for officer assistance while in public and to protect the further interest of the Department. (*See* Defendant's Exhibit #2). Defendants contend that Plaintiff's inside, non-enforcement clerical assignments was, therefore, at the sole behest of Plaintiff and her physician. Effective September 9, 1990, the restriction pertaining to the requirement that Plaintiff only wear civilian clothing was removed." Appendix C, p. 16a; R. 40.

The motion mentions Huntsman's name only twice. In the beginning of the motion, Huntsman pleads: "COMES NOW the City of Houston . . . Greg Huntsman, individually and in his capacity as Sergeant, City Marshall, City of Houston . . . [and] files this their Motion for Summary Judgment under Rule 56, or alternatively, Motion to Dismiss under Rule 12(b)(6) . . . ." R. 41. In Huntsman's prayer he pleads: "WHEREFORE, PREMISES CONSIDERED, Defendants City of Houston, Stringfellow, Lynn and Huntsman pray that the Court shall grant them protection . . . ." R. 30-29. Huntsman's motion pleads no more. The entire motion

of all defendants contains no attachments excepting the three exhibits for the period of June 1990 discussed above.

B. The Law

The court may not consider any material other than the pleadings in determining a motion under Rule 12(b)(6), Fed. R. Civ. P., unless it converts the motion into a motion for summary judgment under Rule 56, Fed. R. Civ. P. 2A *Moore's Federal Practice*, Section 12.07 [2.5]. There is nothing in Huntsman's motion, attachments or Court record that converts his Rule 12(b) motion into a Rule 56 motion. *Village Harbor, Inc. v. United States*, 559 F.2d 247, 249 (5th Cir. 1977); *United States v. East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 57 n.3 (5th Cir. 1979). Huntsman's motion must be treated as a 12(b) motion. On review of the district court's holding under Rule 12(b)(6), the court of appeals may not look beyond the pleadings. *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994). Nevertheless, the appeals court in this instance applied Rule 56 to Huntsman's Rule 12(b)(6) motion.

C. The Court's Power of Supervision Is Required

There is no basis in fact or law to support the ruling of the Court of Appeals for the Fifth Circuit. There exists nothing beyond the pleadings to justify converting Huntsman's 12(b)(6) motion into a Rule 56(c) motion. Nothing.

The appeals court states that: "We agree with Hodges that discriminating against her under the pretense that the city was following her physician's medical advice would provide her sufficient basis with which to defeat qualified immunity; absent any affirmative evidence to the contrary, however, we refuse to speculate about possible impermissible motives. Fed. R. Civ. P. 56(c) does not permit Hodges to rely upon the mere pleadings to satisfy her summary judgment burden. *Celotex*, 477 U.S. at 324."

Without any justification in the record, the Court below has used the standard for Rule 56(c) set out in *Celotex Corp. v. Catrett*, 477 U.S. 319, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986), rather than the standard for Rule 12(b)(6), and therein has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

The distinction between the standard used for Rule 12(b)(6) and the standard used for Rule 56(c) motions under the Federal Rules of Civil Procedure is clear. The Fifth Circuit ignores this well established standard. Failure by this Court to correct misjustice obvious on its face will blemish the record of integrity of the Court of Appeals for the Fifth Circuit and do manifest injustice to Hodges.

By applying the requirement under *Celotex*, *supra.*, applicable to Rule 56(c) motions and holding that Hodges

could not rest on her pleadings in responding to a Rule 12(b)(6) motion, the lower Court opinion is inconsistent with this Court's previous holdings and expands and distorts *Celotex* beyond any reasonable interpretation intended or imagined by this Court. Permitting the decision below to stand will create disruption.

The Fifth Circuit opinion of not allowing Hodges to rest on her pleadings under Rule 12(b)(6) conflicts with every other circuit that has ruled on the standard to be used for Rule 12(b)(6) motions. E.g., *Garita Hotel Ltd. v. Ponce Fed. Bank*, 958 F.2d 15 (1st Cir. 1992); *Festa v. Local 3, Int'l Bhd. of Elec. Workers*, 905 F.2d 35 (2nd Cir. 1990); *J. M. Mechanical Corp. v. U.S. by U.S. Dept. of HUD*, 716 F.2d 190 (3rd Cir. 1983); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983).

CONCLUSION

For the reasons stated above, Petitioner Katherine Hodges requests the Court to issue writ to review the decision of the Court of Appeals for the Fifth Circuit.

Dated: December 22, 1994

Respectfully submitted,

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Appendix A

APPENDIX A - OPINION FILED AUGUST 30, 1994 UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20031
Summary Calendar

KATHERINE HODGES,

Plaintiff-Appellee,

VERSUS

THE CITY OF HOUSTON, et al.,

Defendants

E. J. STRINGFELLOW, et al.,

Defendants-Appellants.

Appendix A

Appeal from the United States District
Court for the Southern District of Texas
(CA-H-92-1749)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.
JERRY E. SMITH, Circuit Judge:*

Certain supervisory employees of the City of Houston ("City") appeal from the district court's denial of their motion for summary judgment on the issue of qualified immunity. Concluding that the district court erroneously denied the motion, we reverse and remand.

I.

Katherine Hodges, a black female, alleged race and sex discrimination in her employment as a uniformed marshal in the Houston City Marshal's Office, seeking monetary and injunctive relief under 28 U.S.C. §§ 1981, 1983, 1988, and 2000e. According to Hodges, the defendants wrongfully restricted her employment duties

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely

by ordering her not to wear a City Marshall's uniform, not to drive a City Marshal's vehicle, and not to work extra jobs. The defendants respond that they were complying with Hodges' personal physician's recommendation that she be re-assigned to "inside office duties" and that the restrictions on her employment were consistent with Hodges' personal safety.

Although Hodges does not contest that her physician had recommended lighter duties, she alleges that the city treated her differently from other officers who were plagued by medical limitations or disabilities. Hodges alleges a handful of other incidents that she believes create a pattern of race- and sex-based discriminatory practices on the part of her supervisors.

Believing that they were entitled to qualified immunity, the individual defendants filed a motion for summary judgment on all constitutional claims. The

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decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The individual defendants are E.J. Stringfellow, R.D. Lynn, Jr., and Greg Huntsman.

district court denied the motion, and this appeal follows pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

II.

We review the denial of summary judgment de novo. Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). In order to avoid summary judgment, the nonmoving party must present affirmative evidence that creates a factual issue regarding the existence of each and all elements of the allegation for which that party would have the burden of proof at trial. "Unsubstantiated assertions of an actual dispute will not suffice." Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

Summary judgment claims involving qualified immunity are reviewed initially with respect to the substantive constitutional question--whether plaintiff has asserted a violation of a clearly established constitutional right. Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). Only after the court has determined that plaintiff has sufficiently stated a claim will the court address the qualified immunity issue--whether the right was clearly established at the time the violation occurred. Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993); see also Siegert v. Gilley, 500 U.S. 226, 231-32 (1991).

Appendix A

In determining whether a plaintiff has invoked a clearly-established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "Thus, even if a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable." Pfannistiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990) (citation omitted). On appeal from an order denying summary judgment, "the plaintiff has the burden to produce summary judgment evidence sufficient to create a genuine issue as to whether the defendant's conduct was objectively unreasonable in light of clearly established law." Id.

Hodges has not produced sufficient evidence to create a genuine issue as to whether the City's conduct violated clearly established rights. Viewing the evidence most favorable to Hodges, we discern her only affirmative evidence to be the deposition testimony of Lynn, one of her supervisors.

Upon direct questioning by Hodges, Lynn averred that other marshals with medical handicaps who were of a different sex and/or race than Hodges enjoyed some of the employment privileges denied Hodges. The testimony

does not, however, provide a basis for any inference that (1) the other marshals had medical or physical limitations similar to Hodges's; (2) the other marshals had direct orders from their physicians requesting inside office duties; (3) the city's actions were inconsistent with its proferred rationale of protecting the safety of Hodges and others around her' or (4) the city's actions were predicated on any racial or sex bias against Hodges.

Hodges offers only the allegations in her first amended complaint to support her contentions of racial or sex animus or of the city's false pretenses for limiting her employment activities. We agree with Hodges that discriminating against her under the pretense that the city was following her physician's medical advice would provide her sufficient basis with which to defeat qualified immunity; absent any affirmative evidence to the contrary, however, we refuse to speculate about possible impermissible motives. Fed. R. Civ. P. 56(c) does not permit Hodges to rely upon the mere pleadings to satisfy her summary judgment burden. Celotex, 477 U.S. at 324.

Hodges's citations to Johnston v. City of Houston, 14 F.3d 1056 (5th Cir. 1993), and Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987), do not compel a different result. In Johnston we held that where both parties had submitted proper summary judgment evidence to corroborate each of their versions of the facts,

a genuine issue of fact existed sufficient to deny summary judgment. Johnston, 14 F.3d at 1061. In this case, however, Hodges has rested on her pleadings, an insubstantial form of evidentiary material with which to oppose a summary judgment motion. Similarly, the right involved in Jefferson--the right of a child not to be shackled to a chair during the school day--was sufficiently protected under existing law; reasonable persons would not differ as to its interpretation. In contrast, we agree with the city that, absent proof that would create a genuine issue as to racial or sex-based animus aimed at Hodges, reasonable persons could disagree as to whether following a physician's orders violates clearly established rights.

Concluding that Hodges has not satisfied her burden of creating a genuine issue as to the violation of a clearly established right, we REVERSE.

Appendix B

APPENDIX B - ORDER DENYING PETITION FOR REHEARING FILED SEPTEMBER 28, 1994 UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20031

KATHERINE HODGES,

Plaintiff-Appellee,

versus

CITY OF HOUSTON, ET AL.,

Defendants,

E. J. STRINGFELLOW, In His
Official Capacity As Chief
City Marshal and Individually,

Appendix B

ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION(S) FOR REHEARING

(September 28, 1994)

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

Appendix C

APPENDIX C - ORDER DENYING SUMMARY JUDGMENT OR IN THE ALTERNATIVE, DISMISSAL ENTERED DECEMBER 9, 1993 KATHERINE HODGES V. CITY OF HOUSTON, ET AL.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-92-1749

KATHERINE HODGES,

Plaintiff,

VS.

CITY OF HOUSTON, ET AL.,

Defendants.

ORDER

Appendix C

The defendants' motion for summary judgment or in the alternative, motion for dismissal is Denied.

It is so ORDERED.

Signed this 7th day of December, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

Appendix D

APPENDIX D - STATUTORY PROCEDURES INVOLVED IN THIS CASE

TITLE 28

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

* * * * *

(b) How Presented.

* * * * *

(6) failure to state a claim upon which relief can be granted.

Rule 56. Summary Judgment

* * * * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Appendix E

APPENDIX E - DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, MOTION FOR DISMISSAL - KATHERINE HODGES V. CITY OF HOUSTON, ET AL.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-92-1749

KATHERINE HODGES,

Plaintiff,

VS.

THE CITY OF HOUSTON, ET AL.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, MOTION FOR DISMISSAL

Appendix E

COMES NOW, the City of Houston, E.J. Stringfellow, individually and in his official capacity as the Chief City Marshal for the City of Houston, R.D. Lynn, individually and in his official capacity as Lieutenant, City Marshal, City of Houston, and Greg Huntsman, individually and in his capacity as Sergeant, City Marshall, City of Houston, hereinafter referred to as DEFENDANTS, and in response to Plaintiff's First Amended Original Complaint files this their Motion for Summary Judgment under Rule 56, or alternatively, Motion to Dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and, in support thereof, would respectfully show unto the Court the following:

I.

NATURE OF CASE

Plaintiff KATHERINE HODGES (Moffett), a black female, employed as a City Marshal with the City of Houston Marshal's Office filed suit against Defendants, the City of Houston, Chief City Marshal E.J. Stringfellow, Lieutenant R.D. Lynn, Jr., and Sergeant Gregg Huntsman alleging race and gender discrimination under Title VII (42 U.S.C. §2000(e) et seq.); 42 U.S.C. §1981 and §1983; and the Fifth and Fourteenth Amendment. Plaintiff also

asserts a pendent state law claim for intentional infliction of emotional distress.

Katherine HODGES commenced employment as a City Marshal for the City of Houston on February 24, 1986. As a City Marshal, she was primarily responsible for executing warrants issued from the municipal courts which included operating a marked police vehicle (a City Marshal car) and wearing an identifiable police uniform to carry out her assigned duties. By virtue of her certification as a peace officer, Plaintiff also had law enforcement authority to prevent a crime if committed in her presence.

In 1990, Plaintiff suffered a physical ailment and was placed on restrictive duty by her physician, Dr. Ronald Devere. Specifically, Plaintiff's physician recommended that Plaintiff perform only "inside office duties", as outdoor performance would exacerbate her medical condition. (See Defendant's Exhibit #1 and #3). To accommodate her physician's request, Defendants Chief Stringfellow and Lynn removed all law enforcement duties from Plaintiff, including operating a City Marshal's vehicle and wearing an identifiable uniform, to avoid possible endangerment to her, particularly, if she were required to respond to an immediate call for officer assistance while in public and to protect the further interest of the Department. (See Defendant's Exhibit #2). Defendants

contend that Plaintiff's inside, non-enforcement clerical assignments was, therefore, at the sole behest of Plaintiff and her physician. Effective September 9, 1990, the restriction pertaining to the requirement that Plaintiff only wear civilian clothing was removed.

Defendants vigorously contest Plaintiff's claims of race or gender discrimination and claims of intentional infliction of emotional distress and retaliation. Defendants, having previously answered herein, asserted the affirmative defense of failure to state a claim and qualified immunity to this action. Defendants seek dismissal from this suit, in both their individual and official capacities, on these grounds. The City of Houston also seeks dismissal based upon the summary judgment claims stated below.

II.

MOTION FOR SUMMARY JUDGMENT OR DISMISSAL UNDER THE QUALIFIED IMMUNITY DEFENSE

A. Defendants enjoy qualified immunity from Plaintiff's claims.

Defendants Stringfellow, Lynn, and Huntsman move for dismissal from Plaintiff's claims in their

individual capacities on the theory that they enjoy qualified immunity from suit. Defendants are public officials whose everyday duties encompass the performance of discretionary acts. As such, they are entitled to assert the affirmative defense of qualified immunity in a civil rights action.

Defendants are entitled to qualified immunity for acts taken in their individual capacity where, in light of clearly established principles of constitutional law, they could have reasonably believed that their actions were lawful. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3040 (1987). The doctrine of qualified immunity is an attempt to balance a plaintiff's right to a day in court and a public official's right to be free of concern that his everyday judgment calls and daily discretionary decisions will be closely scrutinized by the Courts. *Anderson v. Creighton*, Ibid at 3038; *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986).

To facilitate balancing these interests, the Fifth Circuit has delineated the respective burdens to be borne by each of the litigants in a case where qualified immunity is an issue. *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987). Qualified immunity is an affirmative defense which must first be pled by the official claiming it. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Once plead, however, the burden then shifts to the plaintiff to

demonstrate that the public official's actions violated clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. at 818; *Whatley v. Philo*, 817 F.2d at 20.

Additionally, since 1985, the Fifth Circuit has consistently required a civil rights plaintiff seeking to overcome the immunity of a public official to come forward with particularized facts demonstrating why the public official is not entitled to claim that defense. *Brown v. Texas A & M University*, 804 F.2d 327, 333 (5th Cir. 1986); *Jacquez v. Procunier*, 801 F.2d 789 (5th Cir. 1986); *Brinkmann v. Johnston*, 793 F.2d 111 (5th Cir. 1986); *Hale v. Harvey*, 786 F.2d 688 (5th Cir. 1986). Here, Plaintiff has failed to allege any detailed facts which would demonstrate why the individual Defendants are not entitled to immunity.

The Fifth Circuit has further held that, in civil rights cases where a defendant may avail himself of the defense of qualified immunity, "the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." *Elliott v. Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985). Only at such time as Plaintiff has specifically plead and proved facts supporting

his claim can the issue of qualified immunity be determined. in fact, absent specific, detailed facts, no federal claim is stated. *Elliot v. Perez*, 751 F.2d at 1483 (Higginbotham, J. concurring).

Plaintiff has failed to plead or prove facts sufficient to appraise the named Defendants of the nature of the constitutional claim that is being urged against them individually. Rather, Plaintiff's claims consist of a series of vague and conclusionary allegations of Defendants' alleged discriminatory treatment towards her. Plaintiff has failed to show that the Defendants have violated any constitutional right or benefit inuring to her. Defendants' summary judgment evidence clearly shows that the sole basis for Hodges' removal to clerical, non-law enforcement duties was principally due to the recommendation of her physician. (See Defendant's Exhibits #1, #2, and #3). Defendants have not violated any constitutional rights of Plaintiff.

Absent particularized factual allegations, Plaintiff has failed to state a cause of action against the individually named Defendants, in their individual capacities, for alleged violations of Plaintiff's constitutional rights.

B. Defendants seek protection from discovery until the qualified immunity issue is resolved.

Appendix E

Because the doctrine of Qualified Immunity not only shields public officials from liability but also from the rigors of pretrial discovery, Defendants request entry of a protective order staying any further discovery as to the named Defendants until this court determines whether the plaintiff has pled facts sufficient to rebut Defendants' presumptive entitlement to immunity from suit. See *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3038 (1987); *Nieto v. San Perlita Independent School Dist.*, 894 F.2d 174, 177 (5th Cir. 1990); and *Jacquez v. Procunier*, 801 F.2d 791 (5th Cir. 1986), quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Federal Courts have long since recognized the harm that public officials and employees face, such as distraction from their duties and the costs of unnecessary trials and the attendant burdens associated with litigation, including discovery and the taking of depositions, if a claim of immunity is not resolved prior to trial. *Mitchell v. Forsyth*, 472 U.S. 511; 105 S. Ct. 2806, 2815-16; 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 817; 102 S. Ct. 2727, 2737-38; 73 L.Ed.2d 396 (1982). Indeed, in Federal Court, once the issue of immunity is raised, plaintiff is prohibited from engaging in further discovery until the Court determines the immunity question. *Harlow*, supra, 475 U.S. 818, 102 S. Ct. 2738.

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All of the reasons for which the Courts have historically granted immunity are present in this case. Defendants thus pray that the Court will grant Defendants protection and stay discovery in these proceedings with respect to the named party-Defendants until the issue of qualified immunity has been resolved. This motion is not made for delay, but instead made so that justice may be done.

III.

MOTION TO DISMISS

1981 ACTION

Plaintiff has failed to state an actionable 42 U.S.C. §1981 claim against Defendant City of Houston.

Utilizing the remedial mechanisms of 42 U.S.C. §1983, a Plaintiff may subject a municipality to liability under a §1981 "right to make contract" claim if a municipal 'policy, practice or custom' so deprived a Plaintiff of a constitutionally protected right under the Constitution or federal laws." See *Jett v. Dallas Independent School District*, 491 U.S. 2701; *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Plaintiff, therefore, must plead and prove a clearly identifiable municipal policy, practice or

custom by a municipal policymaker which served as the "moving force" behind the constitutional deprivation claimed. Id.; see also *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Monell v. New York City Dept. of Social Services*, 98 S. Ct. 2018, 2037 (1978). An isolated incident is insufficient to show the existence of a custom, policy or practice. Furthermore, mere conclusory allegations are insufficient to invoke municipal liability under 42 U.S.C. §1981.

Plaintiff's pleadings are devoid and all discovery in this case fail to show factually supportive evidence disclosing the municipal policy, practice or custom which purportedly has caused her a constitutional deprivation. Seemingly, the only interest Chief City Marshall Stringfellow had in removing Plaintiff from regular duty assignments was to comply with her physician's order to facilitate Plaintiff's recovery and to ensure no further injury or harm to her. Such action hardly constitutes a constitutional deprivation. Plaintiff's pleadings, thus, fail to show any actions taken by Chief Stringfellow or any other Defendants in this action to warrant her claims.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Pendent State Law Claim - Intentional Infliction of Emotional Distress

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To establish a municipality's liability for commission of intentional torts by its officers, agents and employees, the party proponent must first ascertain whether the activities engaged in by the municipality are proprietary or governmental. Proprietary functions are "those functions that a municipality may, in its discretion, perform in the interest [and for the benefit] of the inhabitants of the municipality" rather than the general public. See TEXAS TORTS CLAIMS ACT, Tex. Civ.Prac. & Rem.Code Ann. §101.0215(a).

If the municipality is engaged in a proprietary function, the City is not immune from suit and would be subject to the same duties and liabilities as a private person or corporation. See Tex. Civ.Prac. & Rem.Code Ann. §101.0215(b). See also *Dillard v. Austin Independent School Dist.* (App. 3 Dist. 1991) 806 S.W.2d 589, application for writ or error filed. If a municipality is engaged in a governmental function, the City enjoys sovereign (governmental) immunity from suit, except to the extend that immunity is waived under the Texas Tort Claim Act. See TEXAS TORTS CLAIMS ACT, Tex.Civ.Prac. & Rem.Code §§101.025 and §101.021.

Or, stated another way, unless a Plaintiff can bring his case within the Texas Tort Claims waiver of immunity under §101.021, then the doctrine of governmental

immunity bars his right to recover against a municipality or other governmental entity. See Tex.Civ.Prac. & Rem.Code Ann. §101.021; See also *Townsend v. Memorial Medical Center*, 529 S.W.2d 264 (Tex.Civ.App.--Corpus Christi 1975, writ ref'd n.r.e.). Under this provision, municipal liability will be imposed if the Plaintiff successfully asserts a claim "arising from the use of publicly owned vehicles, premises defects, and conditions or use of property". See Tex.Civ.Prac. & Rem.Code Ann. §101.021.

If, however, the cause of action arises from an intentional tort, the Texas Torts waiver provision (§101.021) will not apply since a governmental entity is specifically exempt under §101.057(2) from suits alleging the commission of intentional torts by its officers, agents and employees. See Tex.Civ.Prac. & Rem.Code Ann. §101.057(2); See also *McCord v. Memorial Medical Center Hospital*, 750 S.W.2d 362, 363 (Tex.Civ.App.--Corpus Christi 1988, no writ); *City of Dallas v. Moreau*, 718 S.W.2d 778, 779 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.); *Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex.Civ.App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.), cert. denied, 454 U.S. 833, 102 S.Ct. 132. The underlying theory for the "intentional tort" exemption is that if an employee commits a intentional tort while in the course and scope

of his employment, that employee should be individually liable for his actions, not his employer.

It is apparent from the lack of any evidence, factual basis or the face of the pleadings, that Plaintiff has failed to show that Defendants' affirmative defense has been waived. The facts Plaintiff has pled (or rather the clear absence of facts) negates her cause of action against Defendants since none of the injuries she claims to have suffered resulted from "the use of publicly owned vehicles, premises defects, or conditions or use of city property" under the waiver of immunity clause. Hence, Plaintiff has pleaded herself right out of court.

Defendants would further submit that Plaintiff's Fourth Claim for Relief (Intentional Infliction of Emotional Distress) sounds in tort law. See Tex. Civ.Prac. & Rem. Code §73.001; see also RESTATEMENT OF (SECOND) OF TORTS §46 (1966). Under the "intentional tort" exemption, tort claims against a governmental entity in furtherance of a governmental function are inactionable. See also *City of Dallas v. Moreau*, 718 S.W.2d at 779 (libel and slander). An employer's endeavor to accommodate the physical incapacitation of an employee by placing her on indoor clerical duty to afford a reasonable period for recuperation does constitute an act in furtherance of a governmental function or duty.

In conclusion, the doctrine of governmental immunity is the "insuperable barrier" which shields Defendants from liability and entitles them to summary judgment on the pleadings in this matter. *Strickland v. City of Denver City*, 559 S.W.2d 116, 119 (Tex.Civ.App.--Eastland 1977, no writ); See also *Hargrove v. City of Rotan* 553 S.W.2d 246 (Tex.Civ.App.--Eastland 1977, no writ).

B. Plaintiff fails to state a claim under the Tort Intentional Infliction of Emotional Distress.

To assert a claim for intentional infliction of emotional distress, a plaintiff must show that: "(1) the defendant acted intentionally or recklessly, (2) the conduct was 'extreme and outrageous', (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe." See *Tidelands Auto Club v. Walters*, 699 S.W.2d 939, 942 (Tex.App.--Beaumont, 1985, writ ref'd, n.r.e.). "Outrageous" conduct is defined as that kind of conduct which surpasses "all possible bounds of decency" and is "utterly intolerable in a civilized community...." RESTATEMENT (SECOND) OF TORTS §46, Comment d (1965).

Plaintiff's claim of intentional infliction of emotional distress is without merit. Plaintiff has failed to plead or prove facts showing that Defendants acted

intentionally or recklessly; that Defendants' conduct was "extreme and outrageous"; or that the emotional distress she claims to have suffered was severe. Defendants conduct was precipitated by their desire merely to comply with Plaintiff and her physician's request.

C. **Plaintiff's suit is barred for failure to comply with the mandatory notice of claim provisions under the City Charter.**

Plaintiff has wholly failed to comply with all conditions precedent before bring this action. Under the Charter of the City of Houston, a claimant is required under Article IX, Section II, to give the Mayor and the City Council of the City of Houston notice of the alleged occurrence(s) upon which her claim is based and the extent of damages suffered (among other miscellaneous requirements) within (90) days of the alleged incident. Exhibit B; See also TEXAS TORTS CLAIM ACT, Tex.Civ.Prac. & Rem. Ann. Code §101.101. If the Plaintiff failed to give such notice, her claim is barred. *City of Houston v. Torres*, 621 S.W.2d 588 (Tex. 1981).

The purpose of the "notice of claim" requirement is to ensure a prompt reporting of claims to enable the municipality to investigate while facts are fresh and conditions remain substantially the same and, thus, enable the city to gather the information needed to guard against

unfounded claims, settle claims and prepare for trial." Id. at 591.

Since Plaintiff has failed to plead or prove any facts to show that she provided Defendants' verified notice of her claim before initiating suit, her claim should be summarily dismissed.

PUNITIVE DAMAGES

Defendants are immune from punitive damages under Plaintiff's claims.

Title VII, even as amended by the Civil Rights Act of 1991, does not allow recovery of punitive damages against a municipality. The Civil Rights Act of 1991 provides that a party cannot recover punitive damages from "a government, government agency on political subdivision." See also 42 U.S.C. A. §1981(a) and Sec. 1977(a) of the Civil Rights Act of 1991.

Likewise, a municipality is immune from punitive damages in a claim brought under 42 U.S.C. §1983. *City of Newport v. Fact Concerts, Inc.*, 43 U.S. 247, 101 S.Ct. 2748, 69 L.Ed. 616 (1981). Similarly, the two circuits that have considered the question of punitive damages against a municipality under §1981 have applied the reasoning of

Fact Concerts, *supra*, and held that a municipality is immune from punitive damages under §1981. *Heritage Homes v. Seekonk Water Dist.*, 670 F.2d 1 (1st Cir. 1982), *cert. denied*, 457 U.S. 1120 (1982); *Poolaw v. City of Anadarko, Okla.*, 738 F.2d 364 (10th Cir. 1984); *Lee v. Wyandotte County, Kansas*, 586 F.Supp. 236, 239-240 (D. Kan. 1984). *Contra*: *Boyd v. Shawnee Mission Public Schools*, 522 F.Supp. 1115 (D.Kan. 1981) (Specifically overruled in *Lee v. Wyandotte County, Kansas*, *supra*). Moreover, the Jett holding that §1981 claims must be enforced under §1983 effectively approves the reasoning in *Heritage Homes* and *Poolaw*, *supra*. Accordingly, Plaintiff's claims for punitive damages should be dismissed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants City of Houston, Stringfellow, Lynn and Huntsman pray that the Courts shall grant them protection; that Plaintiff's 42 U.S.C. §1981 claim be dismissed for failure to state a claim or Plaintiff be required to replead with particularity the municipal policy, practice, or custom violated by a municipal policymaker; and that summary judgment be granted in favor of all Defendants.

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Respectfully submitted,

/s/ Constance K. Acosta
CONSTANCE K. ACOSTA
Senior Assistant City Attorney
Attorney in Charge for Defendant City of Houston
SBN: 00835650
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P. O. Box 1562
Houston, Texas 77251
(713) 247-2000

OF COUNSEL:

BENJAMIN L. HALL, III
City Attorney

JOHN E. FISHER
Senior Assistant City Attorney

DANITA ROY WILTZ
Assistant City Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached has been forwarded to the office of counsel of record, Patrick Gilpin, 4001 North Shepherd, Suite #103, Houston, Texas 77018 by hand-delivery on the 1 day of October, 1993.

/s/ Constance K. Acosta
CONSTANCE K. ACOSTA

Appendix E

DEFENDANT'S EXHIBIT #1

RONALD DE VERE, M.D.
NEUROLOGY
8200 WEDNESBURY LANE
SUITE 111
HOUSTON, TEXAS 77074

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(713) 777-4122

June 6, 1990

To Whom It May Concern:

Katherine A. Moffett was examined in the Houston Neurology Associate's office March 28, 1990.

Due to Ms. Moffett's complaint of muscle spasm, left shoulder pain & left hand & arm numbness, I recommended physical therapy and further testing.

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I feel her medical problems would effect her outdoor performance; therefore, I recommend inside office duties.

I am also recommending at this time that Ms. Moffett be exempt from gun range shooting until further testing is completed and she is reevaluated.
Sincerely

/s/ Ronald Devere
Ronald Devere, M.D.
RD/md

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DEFENDANT'S EXHIBIT #2

[To] Katherine Hodges
City Marshal

[From] R. D. Lynn, Jr.
City Marshal Lieutenant

June 12, 1990

Restriction of Duties

Due to the fact that you have failed to appear for firearms qualification on your assigned date, you are hereby notified that you will not be authorized to work extra-employment jobs at this time. The department is aware of your Doctor's request and upon his notification that you are able to return to full duties, you will be rescheduled for qualification. Once you have been duly qualified by the Firearms Instructor, Sgt. McLemore, you will return to a status that will allow you to work extra-employment jobs. You should also be aware that under departmental regulations, you must show proficiency with your duty weapon on an annual basis. It is incumbent

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upon each Marshal to ensure that their proficiency is annually tested and duly recorded.

On advisement of your Doctor, your assignments will be of the inside, non-enforcement duties. Please note that until you are diagnosed as capable of returning to a full duty status, the following conditions shall apply;

1) you are not to operate a City Marshal vehicle,
2) you will report to work in appropriate civilian attire.

You should be aware that the Marshals Office takes such steps in an effort to protect both you and the Department. In light of the conditions stated by Dr. De Vere, in his letter dated 06/06/90, the department is concerned of your ability to successfully react in a physical confrontation or a citizens call for help that may occur if you are in a recognizable uniform or a marked City Marshal vehicle. For this reason, you will be assigned inside, clerical duties to perform until a Release to Full Duty Status is provided.

/s/ Lt. R. D. Lynn, Jr.
Lt. R. D. Lynn, Jr.

Approved:/s/ E. J. Stringfellow
E. J. Stringfellow
Chief City Marshall

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DEFENDANT'S EXHIBIT #3

RONALD DE VERE, M.D.
NEUROLOGY
8200 WEDNESBURY LANE
SUITE 111
HOUSTON, TEXAS 77074

(713) 777-4122

June 21, 1990

To Whom It May Concern:

Katherine A. Moffett was last examined in the Houston Neurology Associate's office June 11, 1990.

At this time I still recommend Ms. Moffett continue inside office duties, but she may report to gun range.

I am also recommending she continue to take the medication prescribed for muscle spasm.

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Sincerely

/s/ Ronald Devere
Ronald Devere, M.D.
RD/md